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## COMMENTS

### Trade Friction, Administrative Guidance and Antimonopoly Law in Japan

by Kozo Toyama,  
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and John Palenberg\*

#### I. INTRODUCTION

**J**apan has come under heavy pressure in recent years from its European and North American trade partners to take steps to reduce international trade friction. Favorite targets of critics abroad have been the cooperative relationships which bind Japanese industry and government into what appears to be a solid economic unit: "Japan, Inc."<sup>1</sup> Of particular concern and alarm has been the use of "administrative guidance" (*gyōsei shidō*) by the Japanese Ministry of International Trade and Industry (MITI) to regulate the Japanese economy.<sup>2</sup> Usually issued in the form of

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<sup>1</sup> See, e.g., SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 97TH CONG., 1ST SESS., REPORT ON TRADE MISSION TO FAR EAST 10-17, 83-84 (Comm. Print 1981) (criticizing the role of Japan's Ministry of International Trade and Industry in insulating Japanese industry from foreign competition, particularly through the use of cartels) [hereinafter cited as TRADE REPORT]; Japan Times, Apr. 12, 1983, at A6, col. 3; Japan Times, Apr. 27, 1983, at A11, col. 1.

<sup>2</sup> "Administrative guidance" consists of non-compulsory advice offered by government ministries to the parties which they oversee. See Sanekata, *Administrative Guidance and the Antimonopoly Law*, 10 LAW IN JAPAN: AN ANNUAL 65, 68 (1977); Yamanouchi, *Administrative Guidance and the Rule of Law*, 7 LAW IN JAPAN: AN ANNUAL 22 (1974). A thorough treatment of the nature and theoretical underpinnings of administrative guidance may be found in Narita, *Administrative Guidance*, 2 LAW IN JAPAN: AN ANNUAL 45 (1968). See also *infra* notes 11 and 14.

"non-compulsory" but nonetheless highly persuasive suggestions or veiled threats, administrative guidance is regularly used by MITI to orchestrate the unification of prices, the limitation of production, and, in some cases, outright cartelization.<sup>3</sup> Recently, the Tokyo High Court<sup>4</sup> issued two prominent decisions which focus on the conflict between MITI's market orchestration and the free market principles enshrined in the Japanese Antimonopoly Law.<sup>5</sup>

This article will focus on these two decisions, popularly known as the Oil Cartel Cases, and their relationship to international trade issues. The article first describes cultural conditions which form the broad context in which the Oil Cartel Cases arose before examining the substance and the impact of the two decisions. The attitudes which another Japanese court, the Japanese Fair Trade Commission (JFTC), and MITI have adopted toward the controversy are also considered. Finally, the article argues that the time has come for MITI to curtail its pervasive administrative guidance activity.

## II. TRADITIONAL ATTITUDES

Under the Emperor Meiji's reign (1866-1912), Japan transformed itself from a backward feudal society into a modern industrial state.<sup>6</sup> The startling transformation was planned, initiated and controlled from above—a scheme designed by statesmen determined to put Japan on an

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<sup>3</sup> TRADE REPORT, *supra* note 1, at 10-17, 83-84.

<sup>4</sup> The Tokyo High Court is the court of first instance in Japanese antimonopoly litigation. Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu (Law Relating to the Prohibition of Private Monopoly and Methods of Preserving Fair Trade), Law No. 54 of 1947, art. 85, translated in 2 EIBUN-HOREI SHA LAW BULLETIN SERIES KA [hereinafter cited as Antimonopoly Law]. See generally H. TANAKA, THE JAPANESE LEGAL SYSTEM 48-54 (1976).

<sup>5</sup> Judgment of Sept. 26, 1980, Tōkyō Kōtō Saibansho, Tokyo, 33 Kōtōsaibansho Keiji V 359 (Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu ihan jiken) (Case Concerning the Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade) [hereinafter cited as Oil Production Control Cartel Case]; Judgment of Sept. 26, 1980, Tōkyō Kōtō Saibansho, Tokyo, 33 Kōtōsaibansho Keiji V 511, 528-27 (Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu ihan jiken) (Case Concerning the Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade) [hereinafter cited as the Oil Price Control Cartel Case]. The conflict, pitting MITI against the Japanese Fair Trade Commission, Japan's antimonopoly champion, has flared sporadically over the past thirty years. See Matsushita, *The Antimonopoly Law of Japan*, 11 LAW IN JAPAN: AN ANNUAL 57, 57-58 (1978); Note, *Trustbusting in Japan: Cartels and Government-Business Cooperation*, 94 HARV. L. REV. 1064, 1065-73 (1981). Recent skirmishes between MITI and the JFTC are described in Saida, *Industry Seeks Easing of Antimonopoly Policy; Consumers Speak Out Against Big Business*, INDUSTRIAL REVIEW OF JAPAN 28 (1983).

<sup>6</sup> E. REISCHAUER, JAPAN: THE STORY OF A NATION 118-27 (3d ed. 1981).

equal (if not superior) footing with the powerful nations of Europe and America.<sup>7</sup> The government created capital-intensive enterprises carried them through their unprofitable early years and then, after selling them to favored private concerns, carefully provided for their continued well-being.<sup>8</sup> Laissez-faire and free market economic theories were studied and debated among intellectuals, but never gained enough support to loosen the tight bond between Japanese government and industry.<sup>9</sup> Only after World War II, when the framers of post-war Japan were seeking to "democratize" Japan's monopoly- and cartel-ridden society, did antitrust theory become an animating force in Japanese business organization and law. Modeled upon the U.S. antitrust laws, the "Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade" (the Antimonopoly Law) was super-imposed upon an economic culture quite alien to those in which antitrust theory had developed.<sup>10</sup>

Today, Japan's leaders recognize that a degree of competition is essential to the efficient operation of the market, but they have not abandoned their dedication to the maintenance of orderly and controlled production, pricing, and marketing through direct government intervention in, and coordination of, private industry.<sup>11</sup> The distrust of government which often characterizes business opinion in the United States is generally lacking in Japanese industry. Advice or instructions issued formally or informally by Japan's Ministry of International Trade and Industry (MITI), Ministry of Finance, and other government agencies are regularly assumed to be in accordance with law, entitled to respect, and in the long-term best interests of both the particular industry and society at large.<sup>12</sup> Cooperation and social harmony are often considered desirable

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<sup>7</sup> *Id.* at 109-37; R. STORRY, A HISTORY OF MODERN JAPAN 102-04 (1960).

<sup>8</sup> E. REISCHAUER, *supra* note 6, at 122-31, 159-63; R. STORRY, *supra* note 7, at 121-24.

<sup>9</sup> See W. BEASLEY, THE MODERN HISTORY OF JAPAN 216-17, 226-27 (3d ed. 1981); Kaneko, *A Survey of Philosophy in Japan 1870-1929*, in WESTERN INFLUENCES IN MODERN JAPAN 58-60 (I. Nitobe ed. 1931).

<sup>10</sup> Note, *supra* note 5, at 1066.

<sup>11</sup> See generally *id.* at 1068-73. A discussion of the intensive government intervention at the time of the oil crisis is provided in Smith, *Prices and Petroleum in Japan: 1973-1974—A Study of Administrative Guidance*, 10 LAW IN JAPAN: AN ANNUAL 81, 91-97 (1977). For an exposition of the Japanese government's heavy reliance upon cartels to promote Japanese exports, see Matsushita, *Export Control and Export Cartels in Japan*, 20 HARV. INT'L L.J. 103, 113-116 (1979). See also Japan Times, Feb. 15, 1983, at A12, col. 3 (government-business cooperation perhaps central to Japanese economic process).

<sup>12</sup> We base this observation primarily upon our day-to-day dealings in contemporary Japanese business society. The basic attitude is ancient. Prince Shotoku, the seventh-century A.D. saint-founder of the Japanese state, stated the principle in the first article of the Code of State Ethics:

Harmony is to be valued, and an avoidance of wanton opposition to be honoured. All persons are influenced by class-feelings, and there are few who are intelligent. Hence there are some who disobey their lords and fathers or who maintain feuds

ends in themselves, and not just means to other ends.<sup>13</sup> As a result, there exists a systemic bias in favor of pervasive administrative guidance.<sup>14</sup> Against this backdrop, the Tokyo High Court's oil cartel decisions imposed the first judicially crafted restraints upon the interventionist tendencies of the bureaucracies.

### III. RECENT CASES

#### A. *Oil Production Control Cartel Case (September 26, 1980)*

Just prior to the oil crisis of 1973-1974, Japan's Petroleum Federation (*Sekiyu renmei*)<sup>15</sup> organized a cartel for the control of the production of oil in Japan. The Tokyo Public Prosecutor's Office indicted the Petroleum Federation and its officers for criminal violations of the Antimonopoly Law provisions prohibiting the formation of unauthorized cartels by

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with the neighbouring villages. But when those above are harmonious and those below are friendly, and there is concord in the discussion of business, right views of things spontaneously gain acceptance. Then what is there that cannot be accomplished?

K. SINGER, *MIRROR, SWORD AND JEWEL* 62 (Kodansha ed. 1981). For an analysis of the background to the Japanese public's tendency to respect the instructions and legal interpretations of officialdom, see E. KAPLAN, *JAPAN, THE GOVERNMENT-BUSINESS RELATIONSHIP* 30-32 (1972); Tanaka & Takeuchi, *The Role of Private Persons in the Enforcement of Law: A Comparative Study of Japanese and American Law*, 7 *LAW IN JAPAN: AN ANNUAL* 34, 37-39 (1974). Obviously, there are exceptional cases in which businessmen decline to follow administrative guidance. See, e.g., Smith, *supra* note 11, at 94.

<sup>13</sup> Scholarly treatments of the persistence of the collectivist ethic in Japanese society abound. See, e.g., W. BEASLEY, *supra* note 9, at 256; T. DOI, *THE ANATOMY OF DEPENDENCE* 134-36 (3d ed. 1981); S. KATO, *FORM, STYLE, TRADITION* 27-32 (Kodansha ed. 1981).

<sup>14</sup> A description of the somewhat elastic restraints on bureaucratic discretion in the use of administrative guidance is provided in Narita, *supra* note 2, at 45, 64-72. Professor Narita points out that businesses heed administrative guidance for more than reasons of general respect for the principles underlying harmonious social interaction:

[B]ecause administrative agencies are generally in a superior and domineering position over the people and have behind them all manner of coercive authority based on laws and regulations, it is sometimes easy for administrative agencies to exceed the limits of voluntary action and to engage in actual coercion. Even where administrative agencies have no direct coercive authority over the matter at hand, it is not hard to imagine that the general populace will sometimes comply unwillingly with administrative guidance out of ignorance of the law and out of the fear that the agency will get even with them sooner or later. Under such circumstances, there may be some fear that an administrative agency could, if it were so minded, coolly and without statutory authority compel actions and thus substantially eviscerate constitutionalism by resorting to administrative guidance.

*Id.* at 77.

<sup>15</sup> The Petroleum Federation is the Japanese oil industry trade association. In 1973, its membership consisted of oil companies, 24 of which refined and distributed oil. *Oil Production Control Cartel Case*, 33 *Kōtōsaibansho Keiji V* at 388.

trade associations.<sup>16</sup> The defendants contended inter alia that, in accord with a custom established ten years before the onset of the oil crisis, they had submitted their annual oil supply plan to MITI, and that they had been instructed by, or at least had cooperated with, MITI in the orderly adjustment of Japan's oil market. They claimed that because they had been following MITI's administrative guidance, they could neither have violated the law nor had any criminal intent.<sup>17</sup>

The court found the defendants innocent of criminal violations of the Antimonopoly Law, but only because they lacked *mens rea*.<sup>18</sup> The court determined that MITI had been actively intervening in the oil market and that this intervention had come in the form of administrative guidance, but denied that the MITI involvement in itself absolved the defendants of culpability.<sup>19</sup> The court recognized that MITI officials had "approved" (*shonin*) the oil supply plans at issue in the case, but found that the Petroleum Federation and its members had retained ultimate authority over how much oil the producers would actually produce for the Japanese market.<sup>20</sup> The court concluded that MITI's approval of the Petroleum Federation's production scheme had not been affirmative administrative guidance, but simply passive acceptance of an independently designed, submitted, and executed plan.<sup>21</sup> Thus, the defendants' actions were their own responsibility. However, since the defendants had lacked the requisite awareness of the criminality of their actions, the court acquitted them.

In pathbreaking dicta, the court announced that MITI's administrative guidance per se enjoys no special exemption from the Antimonopoly Law.<sup>22</sup> In the absence of clear statutory authority, instructions from MITI which result in the unauthorized cartelization of producers may involve MITI in a violation of law, regardless of whether MITI issues a detailed plan or simply general instructions to reorder and level production. Particularly treacherous for MITI, concluded the court, are instructions to trade associations which are almost certain to prompt condemnable carte-

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<sup>16</sup> *Id.* at 375-378. The Petroleum Federation was charged with a violation of article 8 of the Antimonopoly Law, which forbids trade associations from, inter alia, committing acts which "substantially restrict competition in any particular field of trade." Antimonopoly Law, *supra* note 4, at art. 8. The indictment of the Petroleum Federation was part of a general crusade against cartelization led by the Japanese Fair Trade Commission. See Smith, *supra* note 11, at 97-99. The case was from the outset particularly important because a judgment against the defendants would have been certain to result in the first *criminal* conviction for cartelization activity which involved administrative guidance.

<sup>17</sup> Oil Production Control Cartel Case, 33 Kōtōsaibansho Keiji V at 480-481.

<sup>18</sup> See *id.* at 506-510.

<sup>19</sup> *Id.* at 486-491.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 490-491.

<sup>22</sup> *Id.* at 481-486.

lization.<sup>23</sup> The court suggested that if economic conditions dictate the formation of a cartel for which there is no statutory Antimonopoly Law exemption, the Japanese Fair Trade Commission's (JFTC) approval should as a general matter first be obtained, as is explicitly required by the Antimonopoly Law.<sup>24</sup>

By noting that administrative guidance may easily trigger illegal cartelization and that MITI had been intervening intensively in the oil industry, the court cast a shadow over MITI's practices and obliquely endorsed a line of arguments which scholarly proponents of free trade policies (and critics of MITI) had been voicing for years.<sup>25</sup>

### *B. Oil Price Control Cartel Case (September 26, 1980)*

Under the same circumstances which gave rise to the oil production cartel, twelve Japanese oil producers<sup>26</sup> joined to form a price cartel during 1972 and 1973, and were indicted in 1974 by the Tokyo Public Prosecutor's Office for price cartelization in violation of the Antimonopoly Law.<sup>27</sup> The defendants maintained their innocence on the basis that they had joined to raise prices only in reliance upon administrative guidance from MITI.<sup>28</sup> The court rejected their argument and found them guilty as charged.<sup>29</sup>

Examining MITI's course of dealing with the oil producers during the oil crisis, the court concluded that MITI had not exercised its administrative guidance to create the oil price cartel, and that MITI's review of, and acquiescence in, the establishment of a common price line had been no more than passive consent in the independently motivated and engineered designs of the oil producers.<sup>30</sup> Accordingly, although MITI had provided the oil producers with direct administrative guidance in pricing in 1971, it had not used any active approval mechanisms in 1972 and 1973, so the oil producers were themselves independently responsible for the oil crisis price cartel, and could not interpose reliance upon administrative guidance as a defense.<sup>31</sup> For purposes of this analysis, the mere

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<sup>23</sup> *Id.* at 484-486.

<sup>24</sup> *Id.* See Antimonopoly Law, *supra* note 4, at art. 24-3.

<sup>25</sup> Oil Production Control Cartel Case, 33 Kōtōsaibansho Keiji V at 484-486.

<sup>26</sup> The twelve companies were Mitsubishi Sekiyu K.K., Zeneraru Sekiyu K.K., Idemitsu Kōsan K.K., Taiyo Sekiyu K.K., Nippon Sekiyu K.K., Showa Sekiyu K.K., Kigunasu Sekiyu K.K., Kyōdō Sekiyu K.K., Maruzen Sekiyu K.K., Daikyo Sekiyu K.K., Shell Sekiyu K.K. and Kyushu Sekiyu K.K. Together they accounted for the lion's share of the Japanese market. Oil Price Control Cartel Case, 33 Kōtōsaibansho Keiji V at 530-31, 542-43.

<sup>27</sup> *Id.* at 542-57.

<sup>28</sup> *Id.* at 605-06.

<sup>29</sup> *Id.* at 526.

<sup>30</sup> *Id.* at 611-14.

<sup>31</sup> *Id.*

fact that the court took notice of MITI's perilously close brush with activity which violated the antitrust laws is noteworthy.

*C. Tsuruoka Branch of the Yamagata District Court Case (March 31, 1981)*

In 1981, the Tsuruoka Branch of the Yamagata District Court had occasion to decide a case which dealt with the same basic issues as the Oil Cartel Cases. The Tsuruoka District Co-op (Co-op) in Yamagata Prefecture, a consumers' cooperative with 1,654 members, sued the Petroleum Industry Federation and twelve of its members in tort for damages the Co-op had allegedly suffered because of the over-pricing of oil in its region during the time of the illegal oil production and price cartels.<sup>32</sup>

The defendants denied civil liability in tort on the basis that the high prices had been imposed under MITI's administrative guidance and that factors other than cartelization were responsible for the advance in prices in the cooperative's district.<sup>33</sup> The District Court ruled for the defendants because of the plaintiffs' inability to show a causal relationship between the damages suffered and the oil cartelizations.<sup>34</sup>

Commenting in dicta upon the relationship between the Antimonopoly Law and administrative guidance, the District Court noted that the Petroleum Industry Law specifically authorizes MITI to regulate the productive capacity of the oil industry, and that, pursuant to that authority, MITI may legally issue administrative guidance to individual producers.<sup>35</sup> Echoing the Tokyo High Court's conclusions, however, the District Court went on to say that MITI *might* violate the Antimonopoly Law by distributing to important producers a table revealing its producer-by-producer allocations of oil market share (that is, by trying to win support for MITI "administrative guidance" by publicizing the de facto cartelization which MITI aims to create), unless a "real necessity" (*hitsuyo yamuo enai bai*) for the revelation of the market share allocation scheme exists.<sup>36</sup> In other words, the District Court challenged the legitimacy of MITI-orchestrated cartels which engage the knowing participation of the cartelized parties in their formation.

On March 16, 1981, the Japanese Fair Trade Commission (JFTC) (MITI's long-time antagonist in struggles over free trade issues) released a Circular concerning the relationship between the Antimonopoly Law

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<sup>32</sup> Judgment of Mar. 31, 1981, Yamagata chihō saibansho Tsuruoka shibu, Tsuruoka, 997 Hanrei jihō 25-37 (1982). For a list of the twelve defendants, see *supra* note 26.

<sup>33</sup> Judgment of Mar. 31, 1981, 997 Hanrei jihō at 39-60.

<sup>34</sup> *Id.* at 84-90.

<sup>35</sup> *Id.* at 75.

<sup>36</sup> *Id.*



and administrative guidance.<sup>37</sup> Designed both to summarize the suggestions of the courts and to establish guidelines for the JFTC's enforcement of the Antimonopoly Law, it merits detailed attention here.

#### IV. THE FAIR TRADE COMMISSION CIRCULAR

In its first section, the Circular announced that administrative guidance lacking a concrete statutory basis runs a high risk of violating the Antimonopoly Law if it tends to restrict the independence of industries in pricing or production, particularly when it is issued to business associations.<sup>38</sup> When issued to individual companies, such administrative guidance is especially hazardous if it involves the distribution of an industry-wide production allotment scheme or some uniform pricing or production standard that would cause companies to comply in the belief that all competitors would also comply. It is also hazardous if the individual companies share with MITI or among themselves a tacit understanding or common intent that cartelization will occur.

In its second section, the Circular declared that administrative guidance issued pursuant to express authorization in a statute does not run afoul of the Antimonopoly Law as long as the guidance does not go beyond whatever is necessary to effect the substance of the legislative policy.<sup>39</sup> In short, the JFTC Circular describes an administrative guidance "danger zone" and calls for restraint in the use of administrative guidance under all circumstances.

Although Japan's courts have not yet directly condemned administrative guidance for causing illegal cartelization, the discussion of both MITI and the Antimonopoly Laws in the Oil Cartel Cases was a clear warning shot. MITI may no longer view the Antimonopoly Law and the JFTC with impunity.

#### V. TRADE FRICTION AND THE OIL CARTEL CASES

From the perspective of public policy, the courts' muted calls for restraint on MITI's part were praiseworthy, albeit perhaps still too deferential to bureaucratic authority. The main issue in the cases—the relationship between antitrust law and administrative guidance—has a direct bearing on Japan's international trade problems, and should be considered by MITI and other policymakers in that context.

The Japanese government has never admitted that it uses adminis-

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<sup>37</sup> FAIR TRADE COMMISSION CIRCULAR (Mar. 16, 1981), *reprinted in* Dokusen-Kinshihō, Kankei-Hōrei-Shū (Showa 57 nenban) (Antimonopoly Law and Relevant Regulations, 1982 ed.) 272-73 (Kōsei torihiki-iinkai jimukyoku, ed. 1982).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 273.

trative guidance to hinder foreign enterprises and curtail free trade. It is, however, a well-known fact that certain cartel arrangements, such as export, import and recession cartels, have been created under MITI's initiative or at least with MITI's assistance.<sup>40</sup>

Even if some of the cartels thus formed are legal under Japanese law, they appear from the perspective of foreign exporters, importers and many affected industries to be non-tariff trade barriers, and are thus a source of trade friction. Indeed, representatives from some foreign industries—notably from the paper, petrochemical, computer, resin, fertilizer, and copper industries—have come to consider the frustration of foreign entries into the Japanese market to be the *raison d'être* of administrative guidance.<sup>41</sup> Regardless of whether such beliefs are accurate, the important thing is that they exist. The perception that Japan cheats in the marketplace damages not only Japan's long-term credibility and standing abroad but also the fabric of a free trade system upon which Japan so heavily depends. If the degree of government interference in international trade through administrative guidance were limited to a minimum, foreign distrust of Japan would be reduced. Thus, the Oil Cartel Cases must be considered as a stepping stone toward a reduction in administrative guidance and a corresponding reduction in trade friction.

## VI. CONCLUSION

The Japanese Ministry of International Trade and Industry (MITI) should follow the Japanese Fair Trade Commission guidelines on administrative guidance. Respect for the popular will and the rule of law should not be trampled by MITI officials, no matter how benign their intentions might be. Ultimately, to promote the opening of the Japanese market place to foreign producers, MITI should retreat to a position where administrative guidance is issued only when necessary. The Japanese economy has reached maturity and a MITI nursemaid is no longer required. That foreign entrepreneurs and governments become upset over both apparent and real protectionist elements in MITI's guidance of Japanese companies is understandable and justifiable. MITI should reevaluate its policies in light of the Oil Cartel Cases. If MITI is serious about reducing trade friction, it has in its hands the means to make an immediate and

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<sup>40</sup> BEIKOKUGIKAI NO BOEKIBUNSEKI—NIPPON, CHUGOKU, HONKON, ASEAN (TRADE ANALYSIS BY THE AMERICAN CONGRESS—JAPAN, CHINA, HONG KONG, ASEAN (GIBBON'S REPORT)) 41-43 (JETRO Japanese ed. 1982); ARTHUR D. LITTLE, INC., NIPPON NO BŌEIKANZEISHOHEKI NI KANSURU AMERICA-JIN NO MIKATA (THE JAPANESE NON-TARIFF TRADE BARRIER ISSUE: AMERICAN VIEWS AND THE IMPLICATIONS FOR JAPAN-U.S. TRADE RELATIONS) 47-48 (Sogo kenkyu kaihatsu kiko, trans. and ed. 1979) [hereinafter cited as LITTLE REPORT]; Oil Production Control Cartel Case, 33 Kōtōsaibansho Keiji V at 486.

<sup>41</sup> LITTLE REPORT, *supra* note 40, at 47-48.

effective contribution to that aim. MITI should immediately exercise more self-restraint in its use of administrative guidance.